

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION FOUR**

**FALCK NORTHEAST CORP.<sup>1</sup>**

**Employer**

**and**

**AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES  
DISTRICT COUNCIL 88**

**Petitioner**

**Case 04-RC-169974**

**DECISION AND ORDER**

This case presents the issue of whether to order an election when the employer claims it will soon be ceasing operations involving the unit employees. The Board has consistently held that the purposes of the Act are not served by ordering a representation election where an employer plans imminently to cease its operations, but the Board will order an election if the cessation is uncertain or distant in time. In this case, the Employer, Falck Northeast Corp., decided on February 8, 2016 to dissolve its operations in Pennsylvania and has since taken definitive and methodical steps aimed at carrying out this decision by June 30, 2016. Therefore, I shall dismiss the petition.

Petitioner, AFSCME District Council 88, seeks an election in a unit of emergency medical technicians (EMTs) and paramedics employed by the Employer at its Plymouth Meeting, Pennsylvania facility.<sup>2</sup> The Employer agrees that this is an appropriate unit, but contends that an election should not be ordered because it will end its operations in Pennsylvania in the near future. Petitioner counters that the Employer's plan to cease operations is speculative and, in any case, not so imminent as to warrant the dismissal of the petition. On February 29, 2016, a hearing officer of the Board held a hearing in this matter.

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<sup>1</sup> The Employer's name was amended at the hearing.

<sup>2</sup> I grant Petitioner's motion to amend the petition as to the unit description.

## THE EMPLOYER'S OPERATIONS

The Employer is the largest provider of ambulance services in the Philadelphia area. It has contracts with Montgomery County, Pennsylvania and several hospital systems in the area, including Crozer Health System.<sup>3</sup> Pursuant to its contract with Crozer, the Employer provides various life support services, which involve transferring patients to and from different Crozer facilities and other hospital systems. There are 142 EMTs and paramedics in the petitioned-for unit.

The Employer contends that it will cease its operations and permanently lay off all unit employees by June 30, 2016.<sup>4</sup> Until then, the Employer will continue to service its contracted facilities as they transition to new ambulance service providers.

## BOARD LAW

The Board will not conduct an election where the employer's closing of its business operations is imminent and certain. *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992); *Larson Plywood Co.*, 223 NLRB 1161 (1976); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646, 647 (1974). However, where the likelihood that the employer's operations will cease is too speculative to warrant withholding from the employees their statutory right to choose or reject union representation, the Board will direct an election. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997); *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976). Factors considered in determining whether the cessation of operations is sufficiently imminent and certain to warrant dismissal of the petition include: the period of time between the representation hearing and the expected date of cessation; steps taken by the employer to cease operations; and whether the employees have been notified. See *Hughes Aircraft Co.*, supra at 82-83; *Larson Plywood Co.*, supra.

## APPLICATION OF BOARD LAW TO THIS CASE

In reaching the conclusion that the Employer will imminently cease its operations, I rely on the following analysis and record evidence.

### **1. *Time until cessation of operations***

The Board has found that where an employer's operations are scheduled to end within three to four months following a representation hearing, no useful purpose is served by directing an election. *Davey McKee Corp.*, 308 NLRB 839, 840 (1992); see also *Martin Marietta Aluminum*, supra (approximately four-and-a-half months after representation petition filed); *M.B. Kahn Construction Co.*, 210 NLRB 1050 (1974) (three months until significant reduction in

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<sup>3</sup> The record does not indicate what other hospital systems the Employer services in the Philadelphia region.

<sup>4</sup> All dates are in 2016 unless otherwise indicated.

force and six months until complete cessation); *General Motors Corp.*, 88 NLRB 119 (1950) (three to six months). In contrast, in *Norfolk Construction Corp.*, 310 NLRB 527 (1993), the Board ordered an election where the employer was not expected to close for at least seven months after the Decision and Direction of Election issued. In *Gibson Electric*, 226 NLRB 1063 (1976), the employer's witnesses testified at the hearing that the employer would cease operations in a few months, and the regional director dismissed the petition based on this testimony. However, on review, the Board ordered an election because the employer's prediction did not prove correct.

In this case, the Employer's Chief Operating Officer (COO), Brendan McNiff, provided unrebutted testimony that the Employer intends to permanently cease all its operations in Pennsylvania by June 30, and the Employer does not currently have any contracts that extend beyond that date. Therefore, its operations should end about four months after the February 29 hearing. Thus, the remaining time before the Employer ceases operations is consistent with the above cases finding similar time spans as indicative of an imminent closure.

## **2. Steps taken to cease operations**

Where an employer makes a decision to cease operations and then methodically implements that decision, the Board has consistently found that it meets its burden to show that the closure of its operations is certain. See e.g., *Hughes Aircraft Co.*, supra, 308 NLRB 82; *Larson Plywood Co.*, supra. However, where an employer provides merely speculative, unsubstantiated, and uncorroborated testimony that it intends to cease operations, dismissal of the petition is not warranted. See e.g., *Canterbury of Puerto Rico*, supra; *March Associates Construction, Inc.*, 22-RC-075268 (2012) (not reported in Board volumes).

On February 8, Employer COO McNiff and several officials of Falck USA held a meeting where they decided to permanently discontinue the Employer's operations in Pennsylvania by June 30, 2016.<sup>5</sup> These officials included President Boo Heffner, Chief Operating Officer Eric Croft, Regional Chief Executive Officer Charles Maymon, and Chief Financial Officer Mike Arguelles. Since then, the Employer has taken several steps to carry out this decision.

On February 26, McNiff notified the Employer's local management officials of the decision to cease operations. On February 25 or 26, McNiff and Maymon verbally informed the Employer's contracted hospital systems that it would cease operations by June 30. To that end, the Employer reached an agreement with the hospital systems to continue to work with them as they transition to new ambulance service providers by the June 30 closure date.

The Pennsylvania Code requires EMS providers to provide notice to any political subdivisions they serve 90 days prior to discontinuing operations. 28 Pa. Code § 1027.13 (2013). In compliance with this requirement, on February 26, the Employer gave written notice to

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<sup>5</sup> The record does not indicate where, outside of the Philadelphia region, the Employer has operations in Pennsylvania. The record also does not indicate the precise relationship of the Employer to Falck USA.

Montgomery County Emergency Medical Services of its intent to cease its operations. Such notice must also be published in a newspaper within the 90-day period prior to closure. Id. McNiff indicated that the Employer planned to publish notice of its intent to close in a newspaper by the end of the week that the hearing was held.

Thus, this factor favors the Employer's contention that its cessation of operations is imminent and certain.

### ***3. Notice to employees***

As of the time of the February 29 hearing, the Employer had not notified employees of its plan to cease operations. However, according to McNiff, the Employer prepared a memorandum from Maymon to be sent that day to all employees in the petitioned-for bargaining unit notifying them of the anticipated June 30 closure date. The notice was to be sent pursuant to the Worker Adjustment and Retraining Notification Act (WARN). In the WARN notice, which is in the record, the Employer cites the "market dynamics" in Pennsylvania and insufficient reimbursement rates from the government and third-party payers as the reasons for its decision to cease operations.

Thus, I find that the Employer has taken steps to notify unit employees of the impending closure.

## **SUMMARY OF FINDINGS**

Since deciding on February 8 to close its operations in Pennsylvania, the Employer has undertaken a series of steps aimed at carrying out this decision. On February 25 and 26, it notified its regional management and contracted entities of the impending closure. On February 29, it was to send WARN notices to its employees. Later in the week, it was to publish notice of its decision to close in a newspaper. There are no contracts for the Employer's ambulance services beyond June 30.

Petitioner contends that the Employer offered only self-serving and uncorroborated testimony from McNiff as evidence of its plan to cease operations. However, the Employer supplemented McNiff's testimony with documentary evidence showing that it had notified Montgomery County EMS of its intent to end its operations, as well as planned notification to employees of their impending layoff. There was no evidence suggesting that the Employer's operations would continue beyond June 30.

Thus, the record clearly shows that the Employer will discontinue all its Pennsylvania operations by the end of June 2016 -- four months after the date of the hearing. Therefore, I find that the Employer will imminently cease its operations, and no useful purpose would be served in

conducting an election at this time. I shall therefore dismiss the petition. *Davey McKee Corp.*, supra, 308 NLRB at 840; *Hughes Aircraft Co.*, supra, 308 NLRB at 83.<sup>6</sup>

To ensure the employees' statutory right to an election, however, if there is new evidence indicating that the Employer is not proceeding to cease operations consistent with evidence it submitted at the hearing, I will entertain a motion by the Petitioner to reinstate the petition. See *Davey McKee Corp.*, supra, 308 NLRB at 840; *Cal-Nevada Lodge*, 235 NLRB 1167 (1978).<sup>7</sup>

## CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.<sup>8</sup>
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

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<sup>6</sup> According to Petitioner, the new representation case rules adopted by the Board on April 14, 2015, created a more streamlined process for issuing Regional Director's Decisions that would allow a quicker election and provide Petitioner more time to bargain than under the previous rules. Although this may be true, I shall not diverge from the Board's longstanding precedent on this issue.

<sup>7</sup> In this connection, I take administrative notice that as of the date of this Decision, the Pennsylvania Department of Labor and Industry website does not indicate that the Employer has filed a WARN notice with the Commonwealth of Pennsylvania.

<sup>8</sup> The hearing officer sustained the Employer's objections to Petitioner's questions of the Employer's witnesses concerning events prior to February 26, when McNiff informed the Employer's local managers of the Employer's plans to cease operations. Specifically, the Petitioner attempted to ask McNiff and employee Sutton whether the Employer was hiring after February 8 and whether the Employer held employee action committee meetings on January 18 and February 25 where it discussed the Employer's plans for the future. As the Employer did not notify the local managers of its decision to close until February 26, any conduct by local management contrary to a decision to close prior to that date would not have been in contravention of that decision. In this connection, there is no evidence that any participant in the February 8 meeting engaged in conduct inconsistent with the decision to cease operations. Thus, the answers to the Petitioner's questions would have been of minimal probative value.

The hearing officer also sustained the Employer's objection to Petitioner's question as to whether the Employer's February 8 decision had been memorialized in writing. Although arguably relevant, the response to this question would not have impacted my findings because, even if it did not memorialize its decision in writing, the Employer has taken several affirmative steps to implement it.

3. Petitioner is a labor organization that claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

### **ORDER**

**IT IS HEREBY ORDERED** that the petition be, and it hereby is, dismissed.

### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **March 29, 2016**.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: March 15, 2016

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**HAROLD A. MAIER**

Acting Regional Director,<sup>9</sup> Region Four  
National Labor Relations Board

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<sup>9</sup> Regional Director Dennis P. Walsh is recused from this matter.